UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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STUDENTS FOR FAIR ADMISSIONS,

Plaintiff,

v. 23 CV 8262(PMH)

ORAL ARGUMENT

THE UNITED STATES MILITARY ACADEMY AT WEST POINT, et al.,

Defendants.

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United States Courthouse
White Plains, N.Y.
December 21, 2023

Before: THE HONORABLE PHILIP M. HALPERN, District Judge

APPEARANCES

CONSOVOY, McCARTHY, PLLC
Attorneys for Plaintiff
PATRICK STRAWBRIDGE
THOMAS McCARTHY
JAMES HASSON

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
JENNIFER ELLEN BLAIN
ALYSSA O'GALLAGHER
Assistant United States Attorneys

THE DEPUTY CLERK: In the matter of Students for Fair Admissions v. The United States Military Academy at West Point, et al.

Will counsel please note your appearance for the record, starting with the plaintiff.

MR. STRAWBRIDGE: Good morning, your Honor.

For the plaintiffs, Patrick Strawbridge. I am jointed by my colleagues Richard Gabriel Anderson, Thomas McCarthy and James Hasson.

THE COURT: Good morning.

MS. BLAIN: Good morning, your Honor.

Ellen Blain from the U.S. Attorney's Office as well as my colleague.

MS. O'GALLAGHER: Alyssa O'Gallagher from the U.S. Attorney's Office.

Good morning, your Honor.

THE COURT: All right. Good morning, counsel.

Everybody please be seated.

I think we have a number of people on the line and so I would ask that you all press your mute button so that you're not interrupting the proceeding. Okay. Thank you for that.

Good morning, Christina.

Well, I'll hear from both of you. I have a number of questions that I would like to work through, but I certainly am delighted to hear from you first.

It's your motion.

MR. STRAWBRIDGE: Thank you, your Honor. And of course I welcome any questions you have in whatever order you would like to ask them.

THE COURT: All right. I'm happy to have you start. I've got a variety of questions for you for sure.

MR. STRAWBRIDGE: Well, I'll just begin by noting where we are in this case.

West Point admits that it was using race to benefit some of the applicants to its academy. Other applicants of different races are not receiving that benefit. That is run-of-the-mill unconstitutional racial discrimination. No civilian college in the country could legally do what West Point is doing today and government programs that expressly discriminate on the basis of race are almost invariably enjoined under strict scrutiny.

The primary question for purposes of this hearing today is whether the Military is somehow special in this arena. The answer to that question is no. Racial discrimination is not made more palatable just because it wears a uniform and applicants to West Point do not deserve lesser than equal protection of the laws simply because they want to attend the academy and serve their country.

To deny the requested injunction here, your Honor would have to sustain the allegedly special interests asserted

by the Army in this case. Those interests have never been recognized as sufficient under strict scrutiny by the United States Supreme Court to justify racial discrimination. And in fact, the Court has invalidated prior attempts to justify racial classifications on the basis of balancing to a particular population for retention or for recruiting purposes.

THE COURT: So let me just stop for a second.

MR. STRAWBRIDGE: Sure.

THE COURT: So I'm a trial judge, so I have to start at the beginning and try and understand all of the nuance that you are presenting to me. And so let me start with this question. And I want to come to the argument that seems to be the main event here, but I've got to get there first.

MR. STRAWBRIDGE: Sure.

THE COURT: So, for example, why did you bring in Lloyd Austin, the Secretary of Defense, and Christine Wormuth I guess in her capacity as Secretary of the Army? I can understand the other two being affiliated with West Point, but why do we need them?

MR. STRAWBRIDGE: We want to make sure that we go up through the sufficient chain of command so we're naming the right people as defendants. If the defendants don't think that that's necessary, we're happy to consider dropping them.

THE COURT: So how is it -- you know, I have your complaint and, trust me, I've read everything you've both sent

me, both sides have sent me, several times now. The complaint just makes kind of the bare-bones allegation that each Secretary is responsible for all aspects of the Military and overseas operations and policies. That doesn't get me to the relationship between those individuals and the Academy. And so I'm just trying to understand. And I have more questions in this vein.

MR. STRAWBRIDGE: Sure.

THE COURT: So help me. Is it just your belief that they should be named? Is that the sum and substance of it?

MR. STRAWBRIDGE: Well, no, not quite. I think our understanding is that those officers are both responsible for effectuating Military policy and Army policy, and I do believe there are regulations that actually govern the United States Military Academy that are promulgated at the Army level, so I think that they're defendants named for that purpose.

THE COURT: In that vein, when we're talking about compelling governmental interests, is it the Army's compelling governmental interest that I'm to be worried about or is it the Academy's compelling governmental interest that I'm to be worried about or is it both?

MR. STRAWBRIDGE: I think it's both because I'm not sure that they're distinct. The Military Academy's asserted interests in this case are interests in what happens I believe when these cadets graduate and enter the Army. So the Academy

is certainly executing upon this policy and it's obviously where the discrimination is happening. We can talk a lot about what we know about that already. But I do think that they're asserting interests into what happens once they leave the grounds.

THE COURT: Okay. I interrupted you.

MR. STRAWBRIDGE: No, no.

THE COURT: It won't be the first time, I promise.

MR. STRAWBRIDGE: I would rather talk about what you want to talk about, Judge.

THE COURT: I appreciate that.

Well, let's talk about something else I want to talk about.

MR. STRAWBRIDGE: Sure.

THE COURT: You take issue with, rather bluntly, whether this is prohibitory or mandatory and I'm struggling to recognize this as anything but mandatory in terms of the nature of this injunction. The case you gave me, this Christa McAuliffe case, was a situation where a policy was about to be implemented and the injunction was to prevent it. Keep the status quo, Judge. Prohibitory. Pretty easy to understand. In this situation, though, I think, if I read this fairly, and I'll hear from the defendant when it's their turn, this injunction requires a remodeling of the admissions process from top to bottom. Or I say top to bottom, but I mean in the areas

in which race is clearly used. And so, in my mind, that means West Point must take affirmative steps, and if they must take affirmative steps, that no longer is status quo, that's me directing them to do things. That's my understanding based on what I read. So let's clear that up for each other.

MR. STRAWBRIDGE: So, yes. So I don't think of it that way. All orders and all injunctions may well require the government to change course or to take affirmative steps. If they're about to implement a policy, they may have to take steps to make sure that policy doesn't get implemented and enforced. There may always be some --some form of --

THE COURT: No, but they have to change the forms. They have to change the -- the regional people have to rethink or re-acclimate themselves to a lacking of race as a factor. There's things to be done and that's what I'm focused on.

MR. STRAWBRIDGE: So, again, I think that almost any injunction may well require steps, but that's not sufficient to turn it into a mandatory injunction where the order of the Court requires some sort of affirmative action by the government.

In this case, this is a classic prohibitory injunction. It's not unlike the County of Westchester case that I think we cited in our letter to you yesterday. All we're asking is that they refrain from doing something; in this case, they refrain from using race as a consideration.

THE COURT: But they're doing it and so they have to stop doing it, and in order to stop doing it, they have to take steps.

MR. STRAWBRIDGE: Yes.

THE COURT: And I don't agree always with the broad statement that every injunction requires people to do affirmative things. If I say you're enjoined from implementing, the status quo ante remains. If I say race is no longer a factor in your process, fix it and fix it now, I'm taking it from what I've read that they have to do things and that's where I'm kind of at loggerheads with the issue. I don't think you think it matters because I think you think that, as a matter of law, this all resolves itself.

MR. STRAWBRIDGE: Well, I think -- so you're right in that I don't think it's the most important point because I think we can satisfy any standard given the fact that it's strict scrutiny and it's an express racial classification.

Let me just provide two more points and if I persuade you, I do.

THE COURT: Yes, yes.

MR. STRAWBRIDGE: I think that -- two points.

Even before the Harvard case, and we'll talk about the Harvard case and its applicability, it was always very clear to anybody who was using race in a college admissions program that it had to be constantly re-evaluated and

constantly checked to see if it was still necessary and adjusted as time goes on. Grutter says that and Fisher says that. And so, in that respect --

THE COURT: This 25-year period of time when all discrimination will be terminated.

MR. STRAWBRIDGE: That's what Grutter said, but even Fisher and Fisher II made very clear that even on a year-to-year basis, colleges had to re-evaluate whether it was still necessary to use the odious racial classification process. So, in that respect, I don't think that there was as much momentum or as much of a constant program as there would normally be at West Point.

My only other point on this and then I'll leave it is that if you look at Winter, which I think is a pretty good example here from the Supreme Court, Winter involved a series of sonar exercises off the coast of California that the Navy had been conducting for four decades. They went in and they got an injunction. And, of course, the Supreme Court ultimately reversed the injunction on the grounds of merits, but what they did not do was apply any kind of heightened test or suggest that this was a mandatory injunction simply because the Navy had been doing it for 40 years. That's I think our strongest argument.

THE COURT: Shutting the light switch off in my mind is different than remodeling an admissions program. That's

where I struggle.

And then the other issue that I have with this is when I look at your order to show cause and I look at your wherefore clause, aren't you asking for pretty much the same relief that you would get should we have a trial and you prevail? Isn't that really --

MR. STRAWBRIDGE: No, I don't think that's the case because, obviously, it would only be suspended for the period of time and if they were to prevail at trial, they could go back to using race. So it's not --

THE COURT: Well, no. If you prevailed at trial, what would I change? I would just make the preliminary injunction mandatory, wouldn't I? I mean permanent. Not mandatory, permanent.

MR. STRAWBRIDGE: I think that's correct, but without the preliminary injunction, we're going to have injuries to our clients in the form of racial discrimination, so I think that's --

THE COURT: Yes, no, I'm very clear, very, very clear on where everybody is, but, again, like I go back to the individuals. It doesn't really answer my question, we think it's appropriate. What I would like is I would like you to meet and confer, and if you don't need these people, I would like you to eliminate them immediately from the action. I don't need the Secretary of Defense as a defendant in my case

unless I need him. If I do, I do. But work that out, okay, and figure it out.

MR. STRAWBRIDGE: We're happy to do that.

And I'll just say right now that, based on what we know now, of course we have no intention of imposing depositions and discovery requests at that level.

THE COURT: Well, I don't know what you intend other than to get an injunction from me today.

MR. STRAWBRIDGE: Correct.

THE COURT: So what I'm intending is that we limit the field of play to the people that are absolutely necessary and proper here. And I would just appreciate it if you would meet and confer and one of you write me a short letter. All of you think it's okay to just send things in and write letters and things. It's not. We'll talk about that. But in this regard, I would like to resolve this.

I guess let me ask you another question before we sort of get to the equal protection that you want to talk to me about and I want to hear from you on.

The premise here is -- I worry that so you're the plaintiff, you come in and, just at a thousand feet, you bring an action under the Fifth Amendment, equal protection, through the Fourteenth Amendment, I get it, and you, as the movant, whether it's a clear showing or just a showing, have the obligation to show a likelihood of success. Humor me.

I think this is a mandatory injunction. So I think I would say today, without the benefit of actually what I'm going to do in writing, I think it's mandatory, it would be a clear showing, and you're now put in the untenable position of having to cobble together the compelling governmental interests that you believe the defendant is going to espouse. And so obviously you're all very capable and you're well read and you've cobbled together what you think are the compelling governmental interests. And when I get to the defendant, we're going to talk about that a little more in detail. But what if it turned out that the allegations that you've made are ajar, different than, what the compelling governmental interests that the defendant asserts are? Doesn't that block me from issuing an injunction?

MR. STRAWBRIDGE: No, I don't think so, your Honor. It's not unusual for a plaintiff to not have the benefit of full information at the time they bring a complaint in a request for emergency relief. It is very often they can only go on --

THE COURT: No, no, no, it's not. You're right. I mean, you're asking for a preliminary injunction and we don't have to have every last detail, but certainly on the critical issue of compelling governmental interests, don't you think you need to give me exactly what it is that the governmental compelling interests from West Point or the Army is? And if

what you've given me is different than what they say it is, don't you think you need to amend your complaint and don't you think you need to do some things here to get this lined up properly? Or is it just that it's so important that, facts be damned, I can just rule?

MR. STRAWBRIDGE: I certainly don't think it's so important that facts should be forsaken. What I would say is that we did have the benefit of the United States filing a written brief and standing up in the well of the Supreme Court a year ago and elucidating what the interests of the Military and the Military academies were in an officer selection and the use of race. So we had that information.

THE COURT: Absolutely.

MR. STRAWBRIDGE: We also now have the benefit of the government's response on the record and we know what their position is with respect to compelling interests.

THE COURT: Well, we're going to come to that, we're going to come to that, but my point is, in the -- these are not compellingly difficult questions, they're straightforward questions. Because, you know, I'm a burden-of-proof person.

MR. STRAWBRIDGE: Sure.

THE COURT: That's where I come from. That's been my life's work. And I'm, in fairness, trying to look at this and see what I can do now and I have a concern, you know, that things are -- they're not cohesively presented. There's a

little of this, a little of that. The government hasn't filed an answer yet. The government's filed affidavits from various people, which I'm going to talk to them about. So have you as an example. They disagree with each other about whether these are compelling or not. And I'm saying, well, given all of this, do we really need to go through this exercise today, now, for a preliminary injunction? Wouldn't this be better and wouldn't everybody be better served rather than racing to an answer yes or no? Because that's what you want from me. You want a yes or a no. And frankly, you know, I'll get you one as soon as I can. But wouldn't we be better served by getting this all tidied up and lined up properly so that the record -- so that I can see and feel what's going on here and get some of these factual issues cleaned up?

MR. STRAWBRIDGE: We start from the premise when we're dealing with an express racially discriminatory government policy that it is presumptively unlawful, and in that context, it is not unusual, once the government admits that it has employed racial classification as part of a program, to come in and put the government to its burden of proof that it can satisfy strict scrutiny, which puts the burden on the government ultimately to demonstrate what its compelling interest is.

THE COURT: But not on this motion.

MR. STRAWBRIDGE: Well, yes and no in that we have --

THE COURT: It's not yes or no. It's your burden. You have the burden.

MR. STRAWBRIDGE: We have the burden of demonstrating that it is clearly likely we're going to win.

THE COURT: Yes.

MR. STRAWBRIDGE: But how do we win? We win by showing that the government cannot meet strict scrutiny. You still have to take into the account the fact that it's strict scrutiny and that it's a racial classification. That still has a role to play in that analysis of whether we are clearly likely to win. And the reality of -- and frankly, that's not so heavy a lift. The government rarely wins on strict scrutiny because the burden is so high, and it especially rarely wins when it admits that it is discriminating on the basis of race. This isn't a case where we come in and we're arguing that there is some sort of implicit racial discrimination or there's a hidden racially discriminatory policy. The government admits that it is using race and it admits that it is using race at West Point to decide a number of slots every year.

The reason why a preliminary injunction is so important to us and to my client is because we have members who have already applied to West Point, are going through the admissions process, one has a nomination for this upcoming cycle, and they want what Gratz, what Grutter, what Harvard, what Adarand say they're entitled to, which is a fair process

that does not use their race against them or which race is not influencing the outcome, and if they're going to get that for this term, they need it in the next, you know, 30 days.

THE COURT: So is it that they wouldn't apply if they didn't get an injunction? Is it that they think that they're going to be discriminated against, Member A and Member C, such that their qualifications won't be considered fairly by West Point?

MR. STRAWBRIDGE: I think, under Gratz, it's very clear that their injury is the lack of an ability to compete in a fair process that is not influenced by race.

THE COURT: I see.

MR. STRAWBRIDGE: And that's what's going to happen to them absent a preliminary injunction.

THE COURT: But they are gong to apply, right?

MR. STRAWBRIDGE: Yes.

THE COURT: You have one that is a member.

Now, let's talk about another loose end here for a minute. Whatever reasoning is associated with the supplemental affidavits, you know, that's not okay just filing some supplemental affidavits. That isn't okay. And I'll hear from the government on whether they object to that or not.

MR. STRAWBRIDGE: I'll just provide a brief explanation. I'm mindful of that and we did have a discussion on our side about whether to do it.

There was an issue that was raised during the Navy argument last week about an alleged weakness in the affidavits regarding whether any of the members had received a nomination or the members received a nomination in mid to late November, which was after the initial papers were filed in this case, and so we just wanted to clarify if there were any concerns or issue about that.

THE COURT: It doesn't change my comment.

MR. STRAWBRIDGE: Understood.

THE COURT: It may or may not be part of this record. I'll hear from the government on it at the appropriate time.

And so I read the affidavit, so I see that one has asked for a nomination, the other has gotten a nomination, and I assume that when you say they're applying, they've filled out the questionnaire. Have they filled out the questionnaire?

MR. STRAWBRIDGE: They are in the -- they have opened up the application process and they are in the process of gathering the information for their applications.

THE COURT: Okay. All right. I interrupted you.

MR. STRAWBRIDGE: The other point that I wanted to make just about the necessity for the preliminary injunction, and I just want to address this, apart from what we think is the inherent harm associated with racial classifications, I think that the government gives little short shrift to the delayed opportunity to, you know, apply and/or attend the

Military Academy.

What some people don't realize about the U.S. Academies is that you cannot transfer into them. If you go -- even if you go and you take credit at another college for a year, once you're admitted to the U.S. Military Academy, you have to start over as a first-year student and you have to go there for all four years. So anybody who has had a 19 or 20-year-old I think can appreciate that it is not a small matter to essentially put your life or your hopes and your dreams on hold for a year while you wait for a fair process. So I think that's another reason why a preliminary injunction is particularly appropriate here.

THE COURT: And then I guess -- before we get to equal protection, I guess the other thing that is on my mind is the competing $400-an-hour experts who disagree with each other. What do I make of that, frankly?

MR. STRAWBRIDGE: Well, it's not unusual to have expert testimony on these issues. There was expert testimony in the University of North Carolina and Harvard cases. As with any evidentiary submission before your Honor, especially at the preliminary injunction stage, you can take it for whatever you find it compelling for. As you know, the evidentiary standards are generally relaxed at the PI stage by necessity, but we did want to provide the benefit of a responsive expert to their experts.

I mean, ultimately we still think that what we're relying on here and what we're asking you to rule on are undisputed facts that the Army has conceded or provided to your Honor themselves and then the legal analysis that accompanies those undisputed facts when you have a case where the government is employing racial classification.

Of course it's preliminary. If your Honor gets the full record and the decision -- if it decides that, you know, the decision at the preliminary injunction stage was incorrect, you can reverse that decision, but that doesn't mean that, you know, you -- the question here is can you rule on a preliminary injunction, do you have enough information to --

THE COURT: No, I can rule. There's no question I have the authority to rule.

Let's talk about what you want to talk about, which is the equal protection and the compelling governmental interests here.

MR. STRAWBRIDGE: Sure.

THE COURT: Strict scrutiny and deference from your point of view. I disregard the deference given completely and it's just a plain old strict scrutiny test because it's the Military and race and it doesn't matter.

MR. STRAWBRIDGE: I think that that's correct. That is our position. And I think that that has to be our position. I also -- that is our position if it's the law. Harvard

includes a specific reference to Korematsu itself in the decision that underscores the need to not be deferential even when the Military is involved. Obviously this is a different policy than Korematsu. I'm not trying to suggest they are identical, but it does establish the point, which is that the Military --

THE COURT: I mean, it's the Footnote 3. It's the Footnote 3. Everybody's looking at Footnote 4. Footnote 3 is also quite informative.

MR. STRAWBRIDGE: Correct.

THE COURT: But does it really say that, Judge, you shouldn't give any deference to the Military? Does it really say that?

MR. STRAWBRIDGE: I mean, I don't think it says that in those words, but I think it highlights the harm in overly -- being overly deferential.

THE COURT: No question. It does highlight the harm, but it doesn't preclude the consideration of deference is the point.

MR. STRAWBRIDGE: Well, what I would say is that, in other examples that are analogous to this -- let's start with the universities. Before Harvard, even when the universities were allowed in some circumstances to use race as part of college admissions, they asked for deference and the Court in Grutter and in Fisher was very clear --

THE COURT: But this is the Military, so universities, put them aside. It's not a fair comparison.

MR. STRAWBRIDGE: Okay.

THE COURT: It's the Military.

MR. STRAWBRIDGE: Let me go to the comparison that the government relies heavily upon, which is Johnson, which was prison officials. Prison officials, as I'm sure your Honor is aware, typically are given an awful lot of deference --

THE COURT: Absolutely.

MR. STRAWBRIDGE: -- in their goals and their management of the safety of their prisons. The policy that was charged in Johnson was a 60-day racial quarantine, essentially, as inmates came in that was expressly designed because of the danger of loss of life or limb and ongoing extreme racial confrontation inside the prison. It's a very strong case for deference under the Supreme Court's rules and I believe there were some dissents, but the majority opinion was very clear we're not going deferential, we're applying strict scrutiny, strict scrutiny is the rule.

And then we've got some of the cases that we cited from the Court of Federal Claims and from the D.C. Circuit in which racial allegations were made against the Military and the Court was quite clear they were applying strict scrutiny.

And when we apply strict scrutiny, we don't defer because racial classifications are odious by their very nature,

they come with an awful lot of harms intrinsically, and nothing but the highest burden of proof can serve to satisfy those rare instances when racial classifications can be justified.

So, yes, our answer is no deference. Your Honor looks at this like you would any other case. And in that respect, I think the Court of Federal Claims, the 2000 case on the reduction of force is I think our view as to how strict scrutiny on racial classifications is properly applied in the context of the Military. I think that's the best example that your Honor has to refer to a court properly applying strict scrutiny to the Military's assertion of the need to classify on the basis of race.

In this case -- and I want to distinguish a little bit between Judge Bennett's order in this case and we obviously -- you just hit on one of the issues that we have with Judge Bennett's opinion, respectfully, and why we think that he might have erred with respect to being overly deferential to the Military's aims, but we also have more facts in this case than were actually available to us in the --

THE COURT: You said that. We've got an admissions policy, Exhibit A and B to the McDonald affidavit. Is there anything else that is more factual than what you had in the other case?

MR. STRAWBRIDGE: Those are the primary sources of the facts, but there's more interesting information in there

and better information in there than the Navy made available at the preliminary injunction stage. And I'll just highlight a few of them.

First of all, we have the admission -- this is on paragraph 80 of the McDonald declaration as well as Exhibit B to that declaration, Section 5 -- that African-Americans and Hispanics are getting racial preferences and whites and Asians are not. That, of course, leads us to the problem that once -- in a case where the admissions are capped and there's only a number of limited seats, all college admissions are a zero sum game. As the Court recently ignored in Harvard, to provide a benefit to some racial groups is to provide a negative to other racial groups. There's no question that that's the case on the Army's own admission.

We also have an admission from the Army that their racial classifications have no discernible end point. They are not temporary and there is no standard by which we can measure when they're going to end. And the Army itself is conceding that they have no end point. And how do we know that? If you look at paragraph 85 as well as Exhibit A to Annex -- or Annex B to Exhibit A of the McDonald declaration, they made very clear that they are balancing to the existing racial demographics within the officer corps, and as those demographics change, they are changing the way in which they employ the preferences. We have an admission that, at one

point, they removed what I would call the segregated review for Hispanic applicants because the number of Hispanics applicants who are graduating from the U.S. Military Academy had reached a level where they did not think that was necessary. Recently, they reinstituted that benefit.

And if you read the Harvard decision, it's very clear on this point as well. Anything that tries to tie a racial benefit to racial demographics is inherently a request to always use race. Because the demographic makeup of the Army has changed over time. It's going to continue to change. The demographic makeup of the officer corps has changed over time. It's going to continue to change in the future. It's completely antithetical to this notion that we're going to allow a limited use of race for a set period of time to achieve a particular end. We have an admission that that's not what's happening here.

And again, going back to Johnson, which they say is the most analogous case for your Honor, that was a 60-day policy involving maximum security prisoners who were a threat to attack one another. This has been going on for decades and it will continue to go on for decades because the target that they're going is to balance to demographic group. That's also problematic under a whole host of decisions, including Bylan, including Adarand, including Grutter and including Fisher, that says racial balancing, trying to manage your racial

demographics to a particular baseline, is inherently unconstitutional. That's never been an accepted interest and it's always been rejected as a legitimate way to go about using race. And Army, or West Point, admits that's what they are doing here.

We also know just how many seats are in play. According to Army, at this stage of the case, which I will accept as true for preliminary injunction, we know exactly how many seats are being affected by the racial preferences according to them. That's in paragraph 93 of Colonel McDonald's declaration. She tells us how many nonwhites received appointments in the 26 and 27 classes in the areas where they claim that race is limited to being used. Taking them at their word, last year, it was 41 seats in a class of 1200 that went to nonwhites. That means the maximum effect of their racial preferences, if you assume all 41 seats would have gone to whites absent the racial preferences, which we don't know, but we will assume, I mean, that's less than five percent of the entire class.

And then that brings us to the next weakness, I think, in Army's overall presentation here, which is the claim that they need to do this at West Point and at West Point only when they are admitting people to class because they have this interest in establishing diversity throughout the Army and throughout the various units. This is a very small number of

seats and it's hard to imagine that it's worth all the negatives that are associated with racial classifications. The reason that is is because if you have 60 or 40 seats, I mean, that's -- like I said, that's three to five percent of any given class at West Point, but West Point only produces 20 percent of the officers that enter the Army every year. So we're talking about less than two percent effect on the --

THE COURT: Pretty good math.

MR. STRAWBRIDGE: -- Army officer class.

Well, it took me a while. I'll confess to that.

THE COURT: I don't trust lawyers' math.

MR. STRAWBRIDGE: Well, I had my colleagues double check it and I encourage your Honor to do so.

But I have two points on this.

One is I don't think the harm for a preliminary injunction is that significant when we're only talking about those number of seats. I don't think you can really have any significant effect on the overall makeup of the Army demographics, which is their claimed interest. Parents Involved is very clear that when we are employing racial classifications for very small numbers, it's simply just not worth it in that case. It's not to suggest that more invasive or larger programs are better, but it does suggest that we should be really thinking hard as to whether we're going to use a racial classification for such a small effect.

The other point that I would make is the compelling interest in establishing diverse units and the assertion that racial diversity across the Army makes a difference in its actual war-fighting capabilities and its abilities to accomplish its missions I think is belied a little bit by the fact that this is the only area where Army is employing racial classifications. The Stitt declaration makes very clear that they do not consider race in promotion and advancement in the Army. There is no evidence before the Court. Indeed, there's evidence in the form of our Spoehr declaration that we submitted that they do not racially balance or racially assign or use race as a factor in assigning individuals to units or to commands or to any other aspect of the Army.

If they really believed in strict scrutiny land, if they really believed that this was essential to their mission, you would expect that they would be doing that, not just simply opening up this one little racial classification at one end of Army admissions and contending that that's what's going to advance their allegedly compelling interest. I think the reason for that is twofold. There's nothing particularly compelling about the racial diversity of the unit. What matters in the unit is merit and accomplishment and cohesion that is built through accomplishing tasks together.

THE COURT: That's Lieutenant Spoehr is it?

MR. STRAWBRIDGE: Yes. General Spoehr, yes.

THE COURT: General Spoehr. Sorry.

Sorry, General.

That's what General Spoehr said.

MR. STRAWBRIDGE: Yes, yes, that's what he said. And obviously that's information we submitted.

I'll just note that the government's other asserted interest here is in recruiting and retention. I think that Wygant and Parents Involved both kind of reject this notion that it can be sufficiently compelling to have a certain demographic representation in the hiring and firing across an institution for purposes of having representation in and of itself. That is not sufficiently compelling to justify the use of racial classifications.

And I do not diminish the seriousness of the racial conflict in the Vietnam era in the Army as well as in society in general. That was 50 years ago. I think, if anything, the Supreme Court precedent in this area makes it very clear that we have to be looking at the circumstances as they exist now. And I do think it's telling that the Army cannot point to any significant racial conflicts of that level that have taken place in the Army since I think 1972 or '73 was their last example. So to the extent that they're trying to suggest that using admissions at West Point in a racially discriminatory way which affects one to two percent of the overall officer class entering the Army every single year is somehow linked to an

interest in preventing racial armed conflict or brawling at the Army level, I simply don't think that they can satisfy their burden. And I think it's unlikely that they will satisfy their burden when we get to the merits.

THE COURT: All right. Let's talk about standing for a minute --

MR. STRAWBRIDGE: Sure.

THE COURT: -- because I don't think you have to tell me the name of the person to have standing. I don't really buy that. I realize others have said you do. The Supreme Court has said you have standing, Member A, Member C. I'm going to hear from the substance of the standing. I don't know whether these are the right people that you've brought forward, and I'm going to hear from defendant on that, but talk to me a little bit about standing. We don't need to talk about the name. I'm not interested in the name.

MR. STRAWBRIDGE: Sure.

THE COURT: But is this really enough? Have you really laid out enough?

MR. STRAWBRIDGE: The answer to that is yes. I think this is exactly what was provided in the Harvard and UNC cases. It's the exact same information that the Supreme Court said was more than sufficient to establish --

THE COURT: You were on those cases, right?

MR. STRAWBRIDGE: And well beyond those cases as

well. It's not uncommon. And indeed, this is -- associational standing like this was originally -- I think came about in the civil rights era by the NAACP. So I think this is standard standing information.

As the case progresses in the future, into discovery, there is additional information that can certainly be provided with a protective order in place that allows them to verify as we get closer to the end of the case, but I do think that we have satisfied our requirement.

The two cases you said on names -- I know you're not persuaded -- that did go the other way are both on appeal, for the record, and several other cases as well.

THE COURT: And of course I'll be guided by whatever the Second Circuit instructs, but just sitting here, I don't really think I need the names.

MR. STRAWBRIDGE: I do want to be -- if your Honor is concerned that we somehow don't have the right people for standing, I would like an opportunity to address that. I'm not so sure what else we need. We think both allege that they are not members of the groups that get the benefit of the racial preference that the Army provides. I think, under Gratz and Grutter and the SFFA cases, that's all they need to do. Frankly, I don't even think -- if you read Gratz, I don't even think it's necessary that they actually apply. Gratz involved someone who just said he was willing and able to apply once

they stopped discriminating, but, in this case, you have two applicants who are going through the application process.

Unless your Honor has any other questions, I'm happy to --

THE COURT: No. I want to hear from the defendants now. Thank you. Thank you very much. I very much appreciate -- I very much appreciate your earnest desire to convince me that you're right. I really do. And the dexterity is obvious, so I appreciate that as well.

All right. Let me hear from the defendant.

And why don't we start here. Whoever's going to argue, it's fine, but I want to talk about sort of a little bit in reverse. I want to talk about what are the compelling governmental interests here. Whose are they? Whose am I supposed to look at? I've actually sort of gotten focused on the varying and differing articulations of the governmental interests here and, so could we start there and then go back to whatever it is you want to tell me.

MS. BLAIN: Of course, your Honor.

May I use the podium?

THE COURT: Sure. Of course.

MS. BLAIN: Thank you.

THE COURT: Thank God COVID's over and we're back to podiums.

MS. BLAIN: May it please the Court.

Plaintiff seeks the extraordinary remedy of a preliminary injunction, which is one of the most drastic tools in the District Court's arsenal. And here's the context in which they seek this preliminary injunction. The context is the Army's critical mission to protect national security. As the Supreme Court has said many times, it is "obvious and unarguable that there is no government interest more compelling than the security of this nation."

In this case, we're talking about the Army's compelling interest in creating a diverse officer corps. Unlike a civilian university, West Point is training cadets for war. Immediately upon graduation, these cadets are commissioned as officers in the United States Army, commanding soldiers in the most lethal and capable ground force in history, capable of indefinitely seizing an adversary's land, resources and population. These officers command soldiers who operate next-generation tanks, drones and artillery systems, paratroopers and frontline troops. West Point is a critical pipeline for these Army officers.

Thirty-three percent of senior Army officers, meaning those above the rank of colonel, are West Point graduates and fifty percent of Army four-star graduates -- sorry -- Army four-star generals are also West Point graduates. And because officers cannot be brought in from the outside, your Honor, the Military must develop these officers internally, meaning that

today's West Point cadets are the Army leaders 30 and 40 years in the future.

The Military has made a professional, considered judgment that having a racially and ethically diverse officer corps, which begins with the racially and ethically diverse cadet corps, is necessary to build cohesive teams critical to creating a combat-ready force, to aid in recruitment and retention and to foster domestic and international legitimacy. This is a national security imperative. And that Military judgment, your Honor, is based on history, real-world experience and qualitative and quantitative research.

Plaintiff's preliminary injunction in this case requests that this Court do three things that are unsupported by the record and in contravention of Supreme Court and Second Circuit precedent.

So, first, plaintiffs request that this Court ignore the history and second-guess decades, from 1963 to 1971 to 1972 to 2009 to 2021 to 2022 and to today, of the Army's most-senior Military leaders that racial diversity in the Army's officer corps is a national security interest. That is a judgment that the Courts have already indicated and the Supreme Court and the Second Circuit have long granted great deference to.

THE COURT: So if we're not going to talk about my first question, let me get to my second question.

MS. BLAIN: I'm happy to talk about your first

question, too, your Honor.

THE COURT: All right. Let's go to the second one first.

How does it work for me? So how do I, as a practical matter, engage the strict scrutiny/equal protection tests, the two steps, and grant deference to the Military? As a practical matter, what analysis -- take me through the steps I need to take in order to arrive at a conclusion. Is it that I just defer because it's the Military or is it that I water down the very clear test, strict scrutiny test? How does this work for me? Like when I go back, you're going home, I'm struggling here to come up with what I think is the right answer, take me through my analysis, please, deference and strict scrutiny.

MS. BLAIN: I'll start with the fundamental premise, your Honor, and then explain how we submit that operates in practice when the Court goes back to its chambers and writes the Court's decision.

So the fundamental premise, which guides the practical reality here, the fundamental premise is that courts traditionally, as the Court well knows, have been reluctant to intrude upon the authority of the executive and Military and national security affairs, particularly -- and that's the case here -- particularly running the complex subtle and professional decisions as to the composition, training, equipping and control of Military forces. The Supreme Court

said that in Gilligan from 1973 and the Supreme Court again said that in 2002, neither of which case are cited by the plaintiffs. Justice Kavanaugh, in 2002, in the U.S. Navy Seals case, again reiterated that, with all due deference to the Court, it is difficult, he says, "to conceive of an area of governmental activity in which the courts have less competence." And that's critical here because this competency is uniquely within the Military's wheelhouse.

And so what does that mean in practice? Well, in practice, fundamentally that means, your Honor, that this is not a battle of the experts. And we know that from the Supreme Court's decision in Goldman when it was evaluating a challenge to the Air Force's regulation under the First Amendment, and, there, it had Air Force declarations and an expert declaration from the plaintiff and it said plaintiff's expert's view was "quite beside the point."

And so that means when the Court is evaluating the evidence that you have before it, six declarations from some of the most senior leaders in the Military backed up by decades of qualitative and quantitative research, the Court should give great deference to that evidence, especially where -- and this is what the Second Circuit has said in Able v. United States in 1998 -- especially where the challenged policy is the result of exhaustive inquiry, because courts are ill-suited to second guess the Military's judgments about Military capability and

readiness.

The D.C. Circuit in 2019, in the Doe 2 case, also said the deference to the Military depends on the nature of the Military interest at stake and whether the Military "used considered, professional judgment."

So, here, your Honor --

THE COURT: None of that involves race, though, right? I mean, none of those cases.

MS. BLAIN: Those cases don't involve race, your Honor. In fact --

THE COURT: Do we have any case that involves race in the Military?

MS. BLAIN: The only case that the Supreme Court has had before it evaluating racial classification in the Military context is Korematsu. In Korematsu, of course, the Court has repeatedly repudiated, but the Court has also repeatedly emphasized deference in the Military context. And while the courts have consistently repudiated that holding, the courts again have consistently looked past the Military's -- rather, let me rephrase that -- given great deference to the Military's judgment in this particular context because this is the context in which the Military has the most competence rather than the judiciary.

So, in practice, your Honor, what the Court has before it is, on the one hand, six declarations based on

decades of history. And not just history from the Vietnam era.

And try as we might, your Honor, just a quick point on that. We can't ignore history. History informs where we are today. And unfortunately, racial discrimination is still an issue in this country and also in the Military. And I just have a point on that and then I'll go back to evaluating the data if that's okay with your Honor.

THE COURT: Sure. You're doing fine.

MS. BLAIN: So in terms of why history is important, because I think this is vital to the Court's consideration of the evidence, so much of the evidence is based on the history of racial tension in the United States Armed Forces, as unfortunate as that is. So it is still relevant today because, unfortunately, as Lieutenant General Stitts says in his declaration at paragraph 18, instances of white nationalism, while rare, are growing in the Military. So are instances of racism and extremism. The 2022 National Defense Strategy also says, "Our efforts at creating a lethal fighting force will fail if we allow problems in our own ranks to undermine our cohesion, performance and ability to advance our mission, and to advance that mission, the Military has repeatedly agreed and tried to address sexual harassment and assault, diversity and discrimination."

The Court need look no further than a letter submitted to West Point by numerous West Point graduates in

2020 outlining their unfortunate legions of experiences, experiencing and feeling racial discrimination. And the Army knows that that's because soldiers are still products of a society from which they come. The Army knows that. Former Secretary of Defense Mark Esper said as much in June of 2020. He said, "We are not immune to the forces of bias and prejudice, whether visible or invisible, conscious or unconscious, and we know that this bias burdens many of our service members." And the Army knew that back in 1969, when the Secretary of the Army also said that, while the Army is not an institution committed to social change, it cannot ignore the realities in which it exists. Soldiers enter service with pre-existing identities and how and whether the Military acknowledges this and builds inclusive organizations helps determine lethality and success.

So try as plaintiffs might, we cannot turn a blind eye to history.

THE COURT: So go back now. Go back now. Because I've read all of this and I've digested it, but go back and tell me. We're sitting at my desk writing. How do I deal with deference and strict scrutiny, please?

MS. BLAIN: Yes, your Honor.

THE COURT: Is it just that I accept the conclusions of the Military that race is necessary as a factor here? Is that where we're headed?

MS. BLAIN: No, your Honor. Deference does not mean judicial advocation. The Supreme Court has made that clear in Rostker. And so we do not -- we are not requesting that this Court advocate from any judicial review. What we are requesting is that the Court grant deference to the evidence and the judgment presented to it by the Military, particularly when, as I was getting to, the Court has before it, on the one hand, six declarations outlining the history, decades of professional Military judgment, real-world combat experience and substantiated by qualitative and quantitative research. That's on the one hand. And on the other hand, the Court has one declaration from a retired lieutenant general who bases the majority of his declaration on, A, his personal experiences and, B, when he does cite sources, he cites either press articles, irrelevant studies or, frankly, mischaracterizes at least two of the studies before the Court.

And so when you compare those things and when you contrast that with the considered professional judgment of the Military repeated again for decades, plaintiff simply cannot meet its burden on this record. And that's where deference comes into play and that is also why this is not a matter ripe for a preliminary injunction ruling. This matter should go to discovery where both sides can create a full factual record, as, again, the District Court in Maryland ruled, and only then will your Honor have a full record before it. And we

respectfully submit that the government will certainly be able to meet its compelling national security interest, and on this record today, they simply have not carried their burden to show that we will not be able to.

THE COURT: You agree, do you not, that strict scrutiny here applies to the Military?

MS. BLAIN: We agree.

THE COURT: And you agree that Footnote 4, which I read several times, contemplates that the Military may have distinct interests from, at the very least, Harvard and University of North Carolina, right?

MS. BLAIN: Absolutely, your Honor.

THE COURT: Okay. And the interests, the compelling governmental interests that the plaintiff has predicated their claim on, are different than the ones you've stated to me this morning. Do you agree with that?

MS. BLAIN: Well, your Honor, let me frame it this way. The inquiry before the Court on strict scrutiny is has the government met its burden to show a compelling governmental interest in the use here of limited -- of an admissions policy that --

THE COURT: You don't think you have the burden of proof here.

MS. BLAIN: Well, not in the preliminary injunction. Of course. In the preliminary injunction --

THE COURT: That's where I am. I'm in the preliminary injunction phase and what I'm urging is the compelling governmental interest -- I'm not urging it, I'm reading it -- that you have espoused on behalf of -- and we have to get to who is it, is it West Point or the Army -- but they're different than what the plaintiff has suggested they are. No?

MS. BLAIN: Well, the government has explained to your Honor in detail what its compelling governmental interest is, and in the preliminary injunction context, the Court must evaluate whether -- and this sort of can be confusing in the context of strict scrutiny versus the preliminary injunction standard, but, here, we would submit that the plaintiff has the burden to show by a clear and likelihood of success on the merits that the government will be unable to meet its compelling interest that it has a national security objective. And so when you're looking at the interest at apply, your Honor, it's the interest of the United States Military on the one hand, and the only time the plaintiff's interest themselves come into play is in the irreparable injury inquiry.

THE COURT: No, no, I get that part. The identification of the compelling governmental interests is the only issue I have in my mind right now, which is, you said, their, if I heard it right, compelling diverse officer corps, cohesive teams, combat ready, recruitment and retention,

boostering the Army's legitimacy around the world.

MS. BLAIN: And at home.

THE COURT: Those are your compelling -- and at home. Those are the compelling governmental interests that the government believes are subject to the strict scrutiny analysis.

MS. BLAIN: With the deference accorded in that analysis to the Military's judgment.

THE COURT: I got it.

MS. BLAIN: Yes, your Honor.

THE COURT: I still don't understand how I defer and apply strict scrutiny other than to say I should consider the evidence, which of course every judge will, and look at it, compare it, contrast it and then accept it because it's the Military.

MS. BLAIN: Well, your Honor, there is precedent here for the Court to go by, of course, and that is the Goldman case where the Supreme Court again was evaluating a First Amendment challenge to an Air Force policy. And of course, a First Amendment challenge is also subjected to heightened scrutiny. And, there, the Supreme Court said, "Our review of constitutional challenges to Military regulations is far more deferential than constitutional review of similar laws or regulations designed for civilian society."

We are not dealing with an admissions policy designed

for civilian society and that is one of the main reasons why this case is very different from Harvard. Try as plaintiffs might like, this case presents an entirely unique context. And the Supreme Court has said in Grutter, in Adarand, in Parents Involved that a Court must evaluate the context when reviewing government policy under an equal protection analysis. And the context here is not just the benefits that flow from educational diversity, as was, you know, at issue before the Court in Harvard and UNC. Instead, what's before this Court is the government's compelling interests in using diversity to create something else, and that something else --

THE COURT: Whose interests? Is it the Army? Is it West Point? Whose interests are we focused in on?

MS. BLAIN: It's both, your Honor.

THE COURT: I see.

MS. BLAIN: West Point has an interest in serving the Army's national security interest in a diverse officer corps. And that's particularly important because West Point disproportionately represents senior Army officers.

And on that note, your Honor, if I could just take a moment to address plaintiff's argument that the numbers don't back up this compelling interest.

Here, we respectfully submit, your Honor, that, number one, the plaintiff simply misunderstands the structure of the Military. Junior officers command 100 to 200 soldiers.

Colonels command 3,000 to 5,000 soldiers. Two-star generals command 10,000 to 15,000 soldiers. Four-star generals, which, again, are 50 percent of whom are West Point grads, command, for example, the Pacific theater, which is hundreds of thousands of soldiers.

So one officer can make a significant difference. And we know that because General Stitt, Lieutenant General Stitt, says that in paragraph 26 of his declaration. He says that it is vital that young recruits see themselves somewhere in significant numbers, somewhere up the chain in the Army, making the Army more representative of the nation, because when they see themselves somewhere up the chain, whether that's the head of the Pacific theater or their lieutenant colonel commander, they are inspired and they're more likely to believe in the mission and in their ability to be promoted and move up the chain themselves. That is why one officer makes a big difference to thousands of soldiers.

The other thing, your Honor, is --

THE COURT: I mean, isn't there another way to do this? Isn't there another -- you know, narrowly construing -- narrowly tailored, rather? Can't you go out and try and recruit the individuals you think are appropriate? Why do we need it in the admissions process? Why can't we do it a different way here?

MS. BLAIN: Two things, your Honor.

One, Fisher II explicitly said that the fact that there are sort of the results of the race-conscious policy is relatively minimal is a feature of narrow tailoring. So it is actually -- West Point is trying to comply with the Constitution and trying to narrowly tailor this as much as possible. And that's one reason why the numbers are small. But, two, in terms of narrow tailoring specifically in terms of the West Point admissions policy, I would turn that over to my colleague, AUSA O'Gallagher.

THE COURT: We'll come to her in a minute.

MS. BLAIN: Okay.

THE COURT: Let's finish with you first.

Okay. I mean, the other thing that's on my mind is let's just say -- and don't read this the wrong way, but if I were to issue an injunction here and say, okay, West Point is no longer going to consider race, tell me about the steps that West Point would have to take in order to implement that direction for me.

MS. BLAIN: Your Honor, that is exactly why this is a mandatory injunction. A mandatory injunction would alter the status quo and the status quo is defined as the parties' prior controversy positions vis-a-vis each other.

So West Point has employed this admissions policy for decades and continues to apply the same policy now. Applicants have applied to West Point under that policy for decades and

continue to do so now. And plaintiffs themselves, in terms of Member C, applied to West Point a year ago under this policy and is applying to West Point now. Their positions have not changed. The only thing that has changed, your Honor, is the decision in Harvard, and while that certainly affects civilian universities' admissions policies, the Supreme Court, as your Honor noted, explicitly carved out the Military academies from that decision, so it could not possibly have changed West Point's policies at that point.

More fundamentally to your Honor's question, this is exactly what West Point would have to do. Number one, you would have to convene the Academic Board at West Point, which is comprised of the heads of all of the academic units on campus. It would have to look at its current policy and decide how to untangle a very complicated knot, as your Honor now knows, to comply with any injunction. It would then have to change that policy and apply a new policy to the current cycle of applicants currently awaiting evaluation. It would also potentially -- and this is the number three and four things, your Honor. Number three, it might have to withdraw already provided offers of appointments and it might also have to withdraw already offered letters of assurance. And West Point has already given out hundreds of letters of assurance and offers of appointments to juniors and seniors in high school. That is a change in the status quo. That is four affirmative

acts that West Point would have to do.

THE COURT: Are there forms that need to be changed? Are there written policies that would need to be changed? Having read this material, I have it in my head that there are regional offices where people are being interviewed and looked at. Are there communications that would need to be changed with respect to those regional offices?

MS. BLAIN: Yes, your Honor. There is a legion of material that would have to be changed. The policies that the Court has before it in the McDonald declarations A and B, those would have to be evaluated and potentially changed, and those can only be changed, again, by a meeting and evaluation of the full Academic Board. And let's not lose sight of the fact that it would then require a change in status for the applicants depending on when they applied to West Point. So the applicants who have applied before an injunction would issue would be evaluated under one standard and the applicants applying thereafter would be evaluated under a different standard.

THE COURT: I mean, that gets solved, right, if there is an injunction to be issued, by making it effective as of a date in futuro, right? It would give the West Point Academy a chance to get its ducks in a row, so to speak, right? That could work.

MS. BLAIN: Well, your Honor, West Point is currently

in the middle of an admissions cycle.

THE COURT: No, I get it.

MS. BLAIN: Right?

THE COURT: I get it.

MS. BLAIN: And as I understand it, the plaintiffs are requesting that this Court today order that it change that policy in the middle of an admissions cycle.

THE COURT: That's what they've asked me to do.

MS. BLAIN: And that would require a tremendous amount of work that, frankly, would first require a tremendous amount of meetings to even figure out what tremendous amount of work would flow from such an injunction. And we respectfully submit that, particularly in light of the compelling national interests at issue here and particularly in light of the lack of irreparable harm and particularly in light, finally, of the deference that courts traditionally give the Military in the context of national security, that would do a great disservice to the Military and it would cause potential harm to the men and women in uniform.

THE COURT: Let me ask you a question. What do you make of the argument about the ROTC candidates from universities? What, if anything, do you make of that? Because Harvard and University of North Carolina I presume have ROTC programs. But what do you make of that?

MS. BLAIN: Well, your Honor, the Harvard decision

doesn't even mention ROTC, so it is unclear exactly what repercussions -- what the Court thought about the government's arguments regarding ROTC because they simply didn't, A, discuss ROTC and then, B, explicitly carved out the Military academies.

THE COURT: So it's a non sequitur. It doesn't help me or hurt me --

MS. BLAIN: Well, exactly.

THE COURT: -- in my understanding of what's here.

MS. BLAIN: It's not relevant, your Honor.

THE COURT: Okay.

All right. What else do you want to tell me?

MS. BLAIN: Just one quick thing, your Honor. And hopefully I'm not being a lawyer and I really mean three quick things, but just one quick thing.

When the plaintiffs cited the Johnson case, Johnson is actually critical, your Honor, and I just want to make clear that, there, the Supreme Court was not not evaluating prison regulations under strict scrutiny; instead, it was evaluating what scrutiny applied to those regulations and then remanded for an evaluation of strict scrutiny. But, there, as the Court noted again in Harvard and cited with favorability, that the Johnson analysis that preventing harm could be a compelling governmental interest would be sufficient in some cases to justify the use of race in a limited way. And that is exactly what the Army is doing here. It is trying to prevent harm to

its men and women in uniform and it is trying to create a lethal fighting force.

So to the extent that the Court looks at Johnson and is evaluating whether or not these goals are measurable, which I will submit plaintiffs have not identified one case in which a court has required the government to identify how well it's protecting national security, certainly not one case in which it has required the Military to evaluate with metrics or any other measurability analyses how well it is protecting our country's borders. And so to the extent that measurability does exist here, your Honor, that would require, again, deference when evaluating the evidence and evaluating the justifications.

And when you're looking at cohesion, there are four things that we respectfully submit the Court could look at if you were to evaluate cohesion in terms of measurability, and the first thing, your Honor, is whether or not there have been any race riots that have occurred since the initiation of the diversity program and there have been none. And that is significant because that is the fundamental thing that the government is trying to prevent. And that is why that is similar to Johnson. It is the prevention of harm.

The Court can also look at the views of the senior Military generals in front of this Court. Again, as in Johnson, the Court noted, Harvard again cited favorably, that a

court can carefully consider the views of officials whose job it is to make security judgments. And, here, you have not just the declarations in front of this Court, but the public statements and the decades of congressionally formed committees of the Department of Defense Board in 2021 comprised of 15 members across the Armed Services, of the 2009 Military Leadership Diversity Council comprised of 30 Military officers. The Court can look at that to determine whether or not the Army is meeting its cohesion.

Third, and I'll do this quickly, your Honor, the Court can also consider the same data that the Army does, which is feedback from its current service members. The OPA report is a multiyear study that evaluated whether or not -- how its service members are feeling about the diversity climate and the health of his or her units. And not just the OPA report. The Court can also consider the Defense Organizational Climate Survey, which is a congressionally mandated yearly review of more than one million service members about their views of cohesion and lethality.

And then, finally, your Honor, in terms of cohesion, the Court can, of course, also look at the numbers and look at the number of, you know, officers with diverse backgrounds who are currently serving in the Army and it can look at the number of minority cadets who are currently at West Point.

So those are three ways that the Court can evaluate

cohesion. We put them in our papers. Otherwise, the Court can evaluate recruitment and retention as well as legitimacy. But I just went down this rabbit hole because I wanted to make clear that Johnson is about which type of scrutiny applies, but did not actually apply strict scrutiny.

THE COURT: All right. Thank you.

MS. BLAIN: Thank you.

THE COURT: Co-counsel.

MS. O'GALLAGHER: Yes. Thank you, your Honor. I'm also going to move to the podium.

THE COURT: Sure.

MS. O'GALLAGHER: May it please the Court, your Honor, and good afternoon.

The first thing that I would like to talk about today is irreparable harm. After I talk about irreparable harm, I'm going to get into the narrow tailoring prong specifically of the strict scrutiny analysis.

You very conveniently actually, for both of us, divided our argument up along the lines that we had divided ourselves, so thank you for that.

THE COURT: I did that on purpose just so you know.

MS. O'GALLAGHER: We appreciate it.

So I want to address irreparable harm first because, as your Honor well knows, irreparable harm is the single most important prerequisite for the issuance of a PI. It should be

considered first in the preliminary injunction analysis, and if there is no irreparable harm, then no PI should issue.

THE COURT: I mean, the problem I have with irreparable harm is -- I don't think I have a problem with irreparable harm here because the Second Circuit says a constitutional law violation de facto is irreparable harm. It's presumed. So why shouldn't I apply that rule?

MS. O'GALLAGHER: Your Honor, respectfully, that's not precisely what the Second Circuit says.

THE COURT: I'm sure that's true.

MS. O'GALLAGHER: In the Agudath case that plaintiff cites, what the Agudath case recognizes is that there's a presumption of irreparable harm that flows from a violation of constitutional rights. And that's a 2020 case from the Second Circuit.

Plaintiff also cites a Southern District of New York case, that's the Arias case, for the proposition that it's settled in the Second Circuit that an alleged constitutional violation on its own constitutes irreparable harm. That question actually, at the time, in 2020, when Arias wrote that, was not settled. And there was a significant split among districts in this circuit about whether the alleged violation of a constitutional injury on its own was sufficient to constitute irreparable harm.

Luckily for us, the Second Circuit actually provided

additional authority in 2020 -- excuse me -- in 2021, so this post dates, the Agudath case. And what the Second Circuit said in the A.H. case -- that's 985 F.3d 165 -- is that, in cases alleging constitutional injury, a strong showing of a constitutional deprivation that results in non-compensable damages ordinarily warrants a finding of irreparable harm.

So what I understood plaintiff to be arguing today and in their papers is that irreparable harm is this constitutional injury which they describe as the inability to compete on equal footing.

What the Second Circuit actually says is, okay, you need a strong showing of a constitutional deprivation that results in non-compensable damages. And when we're looking at that standard, it's important to recognize that the most important factor that the Court should consider in deciding whether or not there is irreparable harm is whether the threatened harm would impair the Court's ability to grant an effective remedy. If we were to go to trial and the Court were to issue a final judgment on the merits, would the Court be prevented at that point in time from granting an effective remedy to the plaintiffs were the plaintiffs to prevail. And when we're looking at the constitutional injury that plaintiffs allege here, the inability to compete on equal footing, the Court would in no way be impaired in its ability to remedy that injury.

So Member A in this instance, in his declaration, notes at that time, only a couple of months ago, that he was not yet 18 and he was a senior in high school. And Member C noted in his declaration, which was filed after plaintiffs filed their preliminary injunction, but still a month or two ago, that, at that time, Member C was 18 and was in college, presumably a freshman in college, first year in college.

West Point's regulations provide that a cadet can enter West Point up to -- so long as, at July 1st of the year that they're entering, they have not turned 23. So the members that plaintiff is relying on here in alleging that they will suffer irreparable harm and are referring to this constitutional injury of not being able to compete on equal footing, were the Court not to issue a preliminary injunction here and were the parties to proceed in the normal course and give the Court the benefit of a full trial record to really make a decision with a full trial record in front of it, there would still be plenty of time to remedy that alleged constitutional injury at the end of a final judgment on the merits. These members have years, potentially up to five years, to continue to apply to West Point.

Plaintiff also, in their papers and here today, describes I think what is essentially, if we're looking at the A.H. case, that there are non-compensable damages as well. And they're referring to losing a year, as they describe it, losing

a year of their lives for these members and potentially being set back in terms of Military seniority.

So with respect to that second part of the injury -- and again, according to A.H., you really need both for there to be irreparable harm. And as your Honor referenced, if your Honor does find this to be a mandatory injunction, the standard is even higher, needs to be a strong showing of irreparable harm. So with respect to that non-compensable damages remedy that these members may lose out on a year of their lives and lose out on seniority, that injury is entirely speculative and irreparable harm must be actual and it must be imminent. That injury relies on a chain of events.

First, these members would have to actually apply to West Point. This is the first we're hearing today before your Honor beyond these late-filed declarations of a couple of days ago that reference that these members have already --

THE COURT: Are you objecting to them, by the way, or you're not going to object to their admission as part of this record?

MS. O'GALLAGHER: Your Honor, I think that the government would respectfully like to reserve that question if your Honor permits, but it's the government's belief that those declarations do not affect the analysis. So even if your Honor were to consider them, it wouldn't move the needle whatsoever.

The only thing that those declarations add is that

Member A, who is the senior in high school, has interviewed with his Congressperson for a nomination and is waiting to learn it if he'll get one, and Member C, who is the college student who applied to West Point last year --

THE COURT: Just hold on a second.

Ma'am, you're going into jury room. You're not leaving the courtroom.

UNIDENTIFIED SPEAKER: Thank you, sir, your Honor.

THE COURT: Sorry.

MS. O'GALLAGHER: That's quite all right, your Honor.

And Member C, who is the student who applied to West Point last year and is now in college, received a nomination from his Congressperson. So those are the only two facts with respect to these two members that these declarations add and that doesn't change the irreparable harm analysis. It doesn't change all of the arguments I just made about the fact that the Court wouldn't be impaired at issuing an effective remedy at the end of a final judgment on the merits and it also doesn't change the fact that irreparable harm in this instance with respect to these members is entirely speculative.

So just to go back to the point there that I was making, this is the first time that the government is hearing today that these members have taken any steps with West Point to apply. So the nomination process. Both members here, though there are several different types of nominations that a

student could receive, both of these members here have pursued congressional nominations. So that process takes place in Congress. West Point does not control or have authority over that process. So with respect to the West Point process, this is the first we're hearing today that plaintiffs have -- that these members have taken any steps to apply.

As we laid out in our papers, there are several things that need to take place, most of which need to take place and need to be completed by the candidate applying by January 31st, which is a little over a month from now, and that requires a candidate who is applying to take step one, fill out the candidate questionnaire. Step two, fill out the second-step kit. There is a physical fitness requirement. There is a medical evaluation requirement.

And these members, in order to have an actual and imminent harm that requires this Court to issue an injunction, would have to demonstrate that they were going to apply and complete all of those steps by January 31st. That they would then be qualified. Because West Point has a process where candidates get qualified and only qualified candidates can be considered for ultimate appointment to the Academy. They would have to then be qualified. They would have to be considered for vacancies; congressional vacancies, service-connected vacations. They would have to be considered for a qualified alternate slot. They would have to not be admitted at any of

those decision points, then be considered at the two discrete points in the admissions process where race is considered and can affect ultimate appointment, so that's at the additional appointee phase and at the superintendent nomination phase, and then not ultimately receive admission because it was due to West Point's limited consideration of race. All of those steps would have to come to pass in order for these two candidates -- excuse me -- these two members to lose out on a year of their lives and lose out on Military seniority and have that injury be traced back to West Point.

So the harm that they allege with respect to these non-compensable damages is completely speculative and, for those reasons, there is no reason for your Honor to issue a preliminary injunction because there is no strong showing of irreparable harm here.

If your Honor doesn't have any further questions about irreparable harm, then --

THE COURT: No, I have none. I understand your point.

MS. O'GALLAGHER: Okay.

So the next point that I would like to talk about with your Honor is narrow tailoring and whether West Point's admissions process here and its very limited consideration of race is narrowly tailored.

So West Point's use of race and ethnicity in

admissions is narrowly tailored to further the Army's compelling national security interest. And I think that the first and most fundamental mistake that plaintiff makes here is taking the Harvard case of last term from the Supreme Court and just applying it mechanistically to this entirely different context.

The Supreme Court has instructed us several times now in cases in the education context and cases in other contexts that context matters in the strict scrutiny inquiry generally and in the narrow tailoring inquiry specifically.

So, in Grutter, the Supreme Court there noted context matters when reviewing race-based government action under the Equal Protection Clause, not every decision influenced by race is equally objectionable, and that the contours -- and importantly for our purposes, for my purposes, that the contours of the narrow tailoring inquiry with respect to race-conscious university admissions must be calibrated to fit the distinct issues raised by the use of race to achieve the asserted interest.

So the Supreme Court's line of cases from Bakke all the way through Harvard, the interest was the same in all of those cases. The compelling interest that was asserted was the compelling interest of universities in the educational benefits that flow from a diverse student body.

The interest -- as my colleague discussed with you,

the interest asserted here by the Army is an entirely different interest. It's an interest in national security and realizing the cohesion and lethality, the recruiting and retention and the legitimacy benefits that flow from having a diverse officer corps.

So we know at the outset from the Supreme Court that when you're looking at a different interest, the narrow tailoring inquiry is different. I think that may leave the Court with the question of, okay, well, what do we do with this line of cases from Bakke to Harvard, and I think the answer is that line of cases provides a framework for the Court, it can anchor the Court, but it can't apply mechanistically because the interest here is it fundamentally different.

With that sort of general framework outlined, I do want to go through the ways in which West Point's policy is narrowly tailored.

So first and fundamentally, the Supreme Court said in Grutter, and this dates back to Bakke, that the consideration of applicants in an admissions process that considers race must be individualized, it must be holistic, it must give serious weight to all the ways that a candidate can contribute beyond just race and ethnicity, race cannot be a defining feature and you can't limit the range of qualities that can be considered to race, but must consider all the qualities that -- all the ways that a student might contribute alongside race and,

through that process, afford an individualized consideration.

At each of the three discrete processes -- excuse me -- three discrete places in West Point's admissions process where race is considered, that individualized process is playing out. So in the LOA process, there's a holistic review of all candidates. Race is not a defining feature. Race is considered alongside several other attributes. And race at no point in the LOA process, in the superintendent nomination process, in the additional appointee process, it's not determinative. It's considered alongside other positive contributions that these candidates might make as cadets and ultimate Army officers.

THE COURT: I thought race came into play in the questionnaire. I thought there was a question in the Part I, Step I questionnaire about race. Is that not true?

MS. O'GALLAGHER: I think what your Honor is referencing is that, in the candidate questionnaire, which is the --

THE COURT: Yes.

MS. O'GALLAGHER: -- step zero, sort of opening up the application, there is a demographic question that asks about race and ethnicity. But Grutter makes clear that West Point need not close its eyes to the race and ethnicity of these candidates. What Grutter says is that race can be considered flexibly as a plus factor in the context of a

holistic analysis where it's not determinative and where it's not made the defining feature of the application or the review process.

THE COURT: I mean, isn't West Point obligated under the OMB regulations to report race?

MS. O'GALLAGHER: Yes. West Point, as an institution that's situated within the Department of Defense, is subject to the Department of Defense mandate to --

THE COURT: Is that why that question is there?

MS. O'GALLAGHER: I think that that question is informed by West Point's reporting requirements. I do think that that question is also there because it's a question that is relevant to the university's consideration of applicants.

THE COURT: Okay.

MS. O'GALLAGHER: But when West Point does, as I mentioned, consider race and ethnicity in its review of applicants, it's doing so in a holistic, non-determinative way and looking, at the same time, at the many other varied contributions that candidates could make as cadets at West Point; athletic contributions, intellectual contributions, leadership contributions. Because at the end of the day, West Point is training cadets to be officers and to command soldiers.

In addition to this holistic, individualized consideration, West Point at no point in its process uses

anything that comes close to what the Supreme Court has described as a quota. What the Supreme Court says when it describes quotas is that a quota is a program in which a certain fixed number or proportion of opportunities are reserved exclusively for minority groups. Nothing in West Point's process even approximates a quota and nothing in West Point's process approximates the insulation or separate tracking of students that the Court found problematic in Bakke.

Plaintiff referred to the idea that what West Point might be doing is engaging in racial balancing, and the Supreme Court has made clear multiple times that outright racial balancing is patently unconstitutional, but the Supreme Court has also said that what racial balancing means is desiring some specified percentage of a particular group merely because of its race or ethnic origin, meaning pursuing diversity for diversity itself, diversity as an ends rather than diversity as a means, and that's not at all what West Point is doing here.

The Army's interest that it's realizing through West Point, as my colleague mentioned, is not in diversity for its own sake. It's not in this idea of racial balancing. For example, in the Harvard case, the Court looked at what UNC was doing and found that UNC was looking at the population of the state, looking at its student body, and just trying to make a match there. What the Army's doing here is trying to realize the benefits that flow from having a diverse officer corps that

I mentioned earlier and it's made the considered judgment that those benefits can only be realized if its officer corps reflects the diversity of the nation and reflects the diversity of the enlisted corps.

And so the fact that the Army is pursuing those interests through West Point makes clear that the Army isn't pursuing diversity for diversity's sake. It's pursuing diversity for the benefits that enure to it as a result. So it's not racial balancing. And it has -- as my colleague mentioned and as we go through in our papers and as our declarations mentioned, the Army is relying on a lot of data, a lot of research, a lot of experience that demonstrates and that bears out and to which this Court should defer that, in order to realize those benefits, it needs to have that reflecting in its officer corps of the diversity of the country and the diversity of the enlisted corps.

So what West Point is doing is just not racial balancing in the way that the Court has described it, seeking a specified percentage of a group merely because of its race.

Plaintiff also mentioned that what West Point is doing here is treating race as a negative and that the Supreme Court made clear in the Harvard case that race can't be treated as a negative. When the Supreme Court in the Harvard case stated that race was being treated as a negative by the respondents there, it had the benefit of a full trial record

before it in both cases. And with respect to the Harvard case, it also had the benefit of a First Circuit appeal. And when the Supreme Court said in those cases, in those instances at Harvard and UNC, that race was being used as a negative, what it meant was that race was being used in a determinative way and it pointed to lots of evidence in the record that suggested that; statistical evidence, evidence that respondents themselves acknowledged that race was used in a determinative way for "some, if not many," of the students that they admit, pointed to Harvard's unique facet of Harvard's admissions process that comes in at the end called the LOP, where the candidates who are on the bubble are all placed together and only four criteria are looked at -- legacy status, recruited athlete status, financial aid and race -- and then, with those four criterion in mind, they do the LOP. They get rid of everyone who's not going to get admitted. And the Supreme Court there pointed to evidence in the record that race is a "determinative tip" for a significant percentage of black and Hispanic applicants.

So what the Supreme Court was really saying in the Harvard case when it said race was being treated as a negative is that race was determinative for a not insignificant number of applicants. Now, contrast that with what the Court has said in Grutter and what I ran through with your Honor just before, that what West Point is doing here is completely different from

that. It considers race holistically, alongside many other factors, and at no point does it operate in this determinative fashion.

And your Honor doesn't have the benefit that the Supreme Court had in Harvard of a full record before it to even make that determination, that race is being used as a negative, but based on the record that the government has provided, plaintiff has certainly not borne its burden to demonstrate substantial likelihood that we won't be able to demonstrate that race isn't being used as a negative.

Plaintiff also mentioned this idea that the Supreme Court's cases in the realm of the use of race in college admissions demonstrates that an end point is needed, and I think that this is one of the key areas where you can't simply take the Supreme Court's jurisprudence from the higher-education civilian context and apply it sort of whole cloth to the context of a Military service academy that fundamentally is training cadets to be officers.

As my colleague alluded to, the more relevant precedent, I think, for this Court to look to in the context of whether an end point is needed is the Johnson case. This is Johnson v. California. And in the Johnson case, what was at issue was the safety of prisoners in the context of racial violence within prisons. The interest here, the national security interest that's at issue here, is much more similar to

that interest of security of prisoners in the context of a prison than it is to the interest that universities have in realizing diversity for the benefits that flow. And those benefits are things like, you know, robust exchange in classrooms and things like that. What we're talking about here is a fundamentally different interest. As I mentioned at the outset, the Court needs to take into account in its strict scrutiny analysis and its narrow tailoring analysis how different that interest is and that really factors into this idea of what an end point is.

So I will mention that, in the McDonald declaration, at paragraph 96, Colonel McDonald does make clear that West Point does not intend to use race indefinitely, but the requirement in Harvard that dates to Grutter that there needs to be some sort of sunset, some clearly defined end point -- in the Grutter case, it was 25 years -- that simply doesn't apply is in this context. So let's look at Johnson again.

The Supreme Court never suggested in Johnson, where it's making clear that strict scrutiny applies to prisons making race-based decisions, it never suggests that prison officers, for example, need to cease considering race at some defined end point. You know, 25 years from now, 40 years from now, at that point, prison officers, you need to cease all consideration of race. And with good reason. Racial violence in prisons doesn't evaporate in a set number of years in the

same way that the Military's need for a lethal and cohesive Army is enduring. A defined end point in this context, similar to the defined end point that the Court described in a completely different higher-education civilian context, it just doesn't track here.

And plaintiff mentioned that, with respect to Johnson, it was this 60-day policy and that what West Point is talking about here is a policy that's operated for decades. Well, it was a 60-day policy with respect to an individual prisoner and the amount of time that the individual prisoner would be subject to segregation, but there was no temporal limit on how long that 60-day policy could be in effect.

So plaintiff's attempt to distinguish Johnson just doesn't hold up, but, though it's the government's argument that this sort of defined sunset, you know, 25 years, 50 years, West Point needs an end point doesn't translate to this completely different interest doesn't mean that what West Point is saying is that it can do whatever it wants with respect to consideration of race and it's actually quite the opposite.

So my colleague on the other side even mentioned that, in Fisher II, in Grutter, the Court has several times stated that universities need to, for example, in Fisher II, use data to assess whether changing demographics have undermined the need for a race-conscious policy. And that's exactly what West Point is doing here. Every two years,

biannually, West Point looks at data about the demographic makeup that it gets from DOD of the officer corps and it considers whether it needs to continue to use its policies that consider race in the same way or whether it needs to modify them.

And the Court doesn't need to look any further than McDonald's declaration to learn that West Point is in fact not only reviewing, but is making changes, the change that my friend on the other side referenced, you know, moving Hispanic candidates from the diversity office, out of the diversity office, based on an acknowledgment that an increase in applications meant that was no longer necessary.

So when the Court looks at this end-point question through the lens of the interest, it's clear that what West Point is doing here is permissible.

I just want to make one more point before I move to the balance of equities, which I'll address briefly, and that is plaintiff referenced several times that there are only very few seats that we're talking about here and he mentioned -- he did some math. And I noticed that your Honor said you don't trust lawyers with math. I also don't trust myself with math, although I would question whether that math is accurate. And I think that that is another reason why we would all benefit from a full record here to really dig into the numbers. But that aside, Justice Kennedy made clear in Fisher II that the fact

that race only comes into play in a narrow way is a hallmark of narrow tailoring. It doesn't mean a policy is less constitutional. It means a policy is more constitutional and is actually, in fact, narrowly tailored.

And then the last thing I want to address, unless your Honor has any further questions, is the balance of equities here and the public interest. So my colleague actually hit on several of the points that I was going to make, so I'll try to make them as succinctly as possible.

The public interest here is in national security. And the public interest -- courts have found that where national security is at play, that the public interest in national security can outweigh individual plaintiffs' constitutional interests. In the Fifth Circuit case Defense Distributed, for example, the Court made that determination, and the defendants would submit that the public interest here clearly weighs in favor of the government given that.

And then the balance of the equities I'll only touch on very briefly because I think my colleague pretty much covered everything. The balance of the equities clearly here weighs in favor of the government. The need to change an entire policy midstream and the affects that that would have not only on West Point that we've really reiterated here, but also on students who are applying and the fact that they could be subject to a different policy depending on when they

applied.

Your Honor mentioned, well, what if I said that the injunction wasn't going into effect until the future, and I think that an injunction at the preliminary injunction stage that doesn't go into affect until the future only underscores the fact that what's needed here is not emergency relief. If it were emergency relief, they would need the injunction to go into affect immediately.

But when we're talking about an injunction that's going to disrupt an admissions cycle, the balance of the equities clearly weighs in favor of the government.

And that was all I had for your Honor today.

THE COURT: All right. Thank you.

I take it you have a comment or two for me, Mr. Strawbridge.

MR. STRAWBRIDGE: Thank you, your Honor. I'm aware of the lunch hour rapidly dwindling.

THE COURT: Don't worry about the lunch hour. That's not a problem for me.

MR. STRAWBRIDGE: I will try to keep this brief.

A couple points to begin with on the record.

My friend on the other side indicated that there was nothing in the record until today that indicated our members were actively taking steps to apply to the Academy. I'm afraid that's just simply not true. Member A, in paragraph 6, makes

very clear that they are undertaking affirmative steps to apply. Member C, in paragraph 5, does the same.

THE COURT: I read that. I understood that.

MR. STRAWBRIDGE: Okay.

With respect to your Honor's concerns about the state of the complaint and the nature of the injunction here, on the complaint, I just want to note that, at paragraphs 40 to 42, we anticipated and described the racial balancing interest, the desire to conform the officer corps to a particular percentage of ethnicities. On paragraphs 45 to 55, we talked about their internal functioning interest, which is the cohesion in the recruitment and retention. And on paragraphs 55 to 60, we talked about their sort of external legitimacy issues, which is you're better able to relate to foreign armies and the United States Army is more legitimate if you use racial preferences at West Point. So I actually do think the complaint anticipated the very interests that they've articulated here.

Two cases for your Honor that involve race and I think underscore that even if steps need to be taken to comply with them, whether it's mandatory injunction or not, it's still worth doing when we're talking about racial classifications.

Vitolo v. Guzman is a roughly recent Sixth Circuit case, 999 F.3d 353. That involved a government grant program, I believe. It involved changing -- a number of changes need to be made when an injunction issues to stop a government grant

program. You might have to relaunch the grant program. You have to change the published criteria. You have to instruct people. You have to have a bunch of meetings to make sure that no one's applying the wrong criteria. But that didn't stop the court in those cases from applying -- from offering injunction.

In Akina v. Hawaii there is a racially classified election. People of only certain ethnicity could vote in an election. The United States Supreme Court, 577 U.S. 1024, actually imposed an injunction stopping them from counting the ballots in the election because it racially classified citizens.

So sometimes significant steps need to be made. I would submit the steps here are really not as significant. It sounds like some meetings and some guidelines need to be changed. Of course, we think an injunction should be prospective. We're not asking for an order that pulls back an offer that somebody has an admission. The vast bulk of admissions offers are going to be made in the months of January, February and March. That comes straight from their own declarations.

We do have a case that involves strict scrutiny and national security interests by the Military. We have cited a case. That case is Korematsu. Everyone agrees what happened in that case and everyone agrees that, if anything, that case puts an exclamation point on the need for real strict scrutiny

even when Military interests are asserted. National security interests -- that was a wartime tactic in the middle of the largest conflict civilization had ever had -- still were wrong and overly deferential to the Military. Everybody agrees. The Supreme Court has said so. The Supreme Court said so in Footnote 3 of Harvard. And if we needed a reminder, Johnson itself says that when government powers at its apex and were applying strict scrutiny, that's when it's most important to double check what they're doing.

Of course there is racial tension in our society. Of course there is racial tension in the Military. Racial tension will probably, in some factor, unfortunately always be with us. That is not a justification for racial classifications. I would submit that there is racial tension at UNC and that there is racial tension on the Harvard campus if the newspapers that I read are accurate.

THE COURT: According to the newspapers.

MR. STRAWBRIDGE: That didn't stop the Court from saying that the strong remedy of racial classifications -- the strong government action of racial classifications could somehow be justified.

On the racial balancing point, I just want to note that I think this is racial balancing. I would refer you to Exhibit B to Colonel McDonald's declaration and the chart at Section 5. If that doesn't meet the classic definition of

racial balancing, I'm not sure what does. What's being measured in that chart is not a particular outcome or a particular benefit that's being received, it's just simply comparing the admissions process and targeting admissions offers for particular populations based solely on ethnicity.

The Harvard case did involve national security interests with respect to the ROTC interests that were asserted. And it was addressed in the opinions. Justice Sotomayor, in her dissenting opinion, noted that all of the national security interests that applied to Military academies had been asserted by the Solicitor General in writing and in argument with respect to the ROTC programs and, unfortunately, from Justice Sotomayor's perspective, that was not sufficient to persuade the Supreme Court to take a different tact with respect to all universities that include those ROTC programs. So there is at least a clue there.

And I want to just finish with I guess two points, one of which has to do with Footnote 4 in this Harvard carve-out. We don't quarrel with Footnote 4. Footnote 4 says the United States service academies may have different interests. It doesn't say they do have different interests. It doesn't even say that those interests would survive strict scrutiny. But it didn't have the record or any information about what the service academies were doing before them and so it didn't opine specifically on that question. But there is a

difference between a carve-out as in like this ruling doesn't apply to there may be other arguments those academies could make. It falls on the former.

And I do think it is somewhat telling that my friends on the other side certainly seem to think that Grutter and Bakke and Fisher inform what they do and how this Court should adjudge the programs. I mean, Harvard is just an application of all those cases. It's the same principles in those cases that Harvard is opining on. So I don't know why the principles would be any less informative as to how we judge whether they can meet strict scrutiny even if, by the letter of the law, the opinion leaves some wiggle room possibly for the Military.

The other thing that I want to say is the importance of strict scrutiny I think is emphasized when my friends, frankly, have to struggle a little bit to explain why an end date isn't really an end date and the requirement that racial classifications be temporary and capable of being measured isn't really a requirement that they be temporary and capable of being measured when they have to recharacterize what was said, when they have to say that race was determinative because of the LOP list. If you read the Harvard decision, the mere fact that race was making any difference in anyone's admission was sufficient to implicate the Fourteenth Amendment in that case, the Fifth Amendment principles in this case.

And as your Honor is probably no doubt aware, in

Windsor, which had to do with the Defense of Marriage Act, the Supreme Court specifically said it wasn't deciding in that case the future of gay marriage and the constitutionality of gay marriage. Nevertheless, when Obergefell came along several years later, it relied directly on the principles from Windsor and extended them to gay marriage. And in the meantime, a number of district courts and a number of lower appellate courts still took the principles of Windsor and had to apply them to the situation even though it was not addressed or, in effect, specifically not addressed in Windsor to rule on that question and that's what we are asking you to do here.

I understand that your Honor may not be prepared to rule today, if I'm reading you correctly.

THE COURT: You're reading me pretty well.

MR. STRAWBRIDGE: We do have an approaching deadline. We understand that filing PIs is an imposition on the Court, but we do want to protect the rights of our members and we do want to protect their rights in the upcoming admissions cycle.

And so, unless your Honor has any other questions for me --

THE COURT: No. I have no other questions.

Let me say a couple of things to both sides here.

First of all, the obvious. I greatly appreciate the effort and the energy and the desire to educate me in, frankly, a fascinating reality situation that I find myself in. And so

I'm very appreciative, honestly, of the hard work here. Because this is hard work. And having spent 40 years on that side of the bench before I was so lucky and privileged as to get to this side of the bench, I know what it takes. And so thank you for spending the time needed.

You're right. I'm not issuing a ruling today because I'm not prepared to issue a ruling today. It's not a burden. It's a privilege for me to be here to do this work, so I'm not burdened at all by the work. I have to digest, frankly, some of what I've heard today and I have to consider whether you have met your burden of proof here in such a way as to issue the kind of injunction that you want me to issue.

I'm fully aware of your deadlines. I'm fully aware of what it is you need to accomplish. And I don't intend to be a cog in the wheel one way or the other, frankly; however, I do need to take the time I need to resolve the issues I need to resolve. They are plentiful here. I have a better understanding now, frankly, than I did walking in the room of some of these finer points and I've got to digest it. So I will get you a decision as quickly as I can. I know what your deadline of January 31st is. I got it. I understand it. I want to be done with this and my thinking on it as quickly as the issues permit me to resolve them. So I'm not going to rule today. I know you got a ruling in the other case from the bench. That judge is a much more experienced district court

judge than I and probably more capable. So I need to work through these issues and I'm in the middle of doing that, frankly. So I will be in touch with you.

Now, let me just say a word about writing to me and helping me any further. I don't do well with unsolicited letter writings. You have something you need to get to my attention, fine, that's okay with me, but just kind of dropping me notes and this and that and here's a supplemental affidavit, Judge, please don't do that. I have no interest in that kind of stuff. You've given me enough to digest. I see where I am. And of course, if something else comes up and you need me, get me. Okay? But don't feel, Judge, I just wanted to, you know, summarize some of the points I made to you in oral argument today. No, thank you. I have a transcript. I'll get the transcript. I'll get what I need out of it. All right?

Again, thank you very much. I hope you get a chance to enjoy some of the holiday spirit and season. You certainly deserve a little time off for at least this presentation, so tell whomever you need to that the Judge said give us a couple of days off now, will you?

All right. Take good care, counsel.
